REMARKS

Claims 1-20, as amended, appear in this application for the Examiner's review and consideration. Independent claims 1, 9, and 13 have been amended to recite that the wafer remains sufficiently flexible under ambient conditions for more than 40 seconds to at least 70 seconds after baking (*See, e.g.*, Specification at page 5, lines 12-15, which states that sufficient flexibility exists for up to 70 seconds or more, and Specification at page 6, lines 33-35, which states that flexibility existed for over 100 seconds). Claim 7 has been amended to recite that the sugar wafer is sufficiently flexible for more than 50 seconds to 100 seconds (*See, e.g.*, Specification at page 5,lines 12-15 and page 6, lines 33-35). Claim 1 has been amended to remove the term "uncooked," but as explained below this does not modify the scope of the claim either to enlarge or narrow it. No new matter has been added by way of these amendments, such that entry of the amended claims at this time is warranted.

In support of the patentability of the present claims, Applicants attach hereto the Declaration of Claudia Conti Under 37 C.F.R. § 1.132 ("Conti Declaration"). Applicants also believe it is critical to the Examiner's understanding of the independent claims of this invention that: (1) none of the references teaches the claimed wafer batter formulations, nor the surprising and unexpected results demonstrated thereby; and (2) sugar wafers and dough-based products are significantly different and that no motivation existed to combine such disparate references. These differences have been further discussed below.

Claims 1-20 were rejected under 35 U.S.C. § 112, first paragraph, for claim language "more than 40 seconds to about 100 seconds after baking" as not being supported by the original disclosure. On the contrary, the original disclosure clearly and explicitly states that "[i]mmediately after baking, the sugar wafer was found to remain flexible *for over 100 seconds which is significantly longer than a standard wafer*" (emphasis added) (Specification at page 6, lines 33-35). Thus, "about 100 seconds" is explicitly supported even though the word "about" is not identically present. To expedite prosecution, however, Applicants have amended the independent claims to recite more than 40 seconds to at least 70 seconds, which the Patent Office should also find to be expressly supported as previously discussed. Moreover, the claims specifically use functional language to recite that the wafer must be sufficiently flexible so as to permit further processing. Although the present invention extends the processing window by lengthening the time of flexibility, the wafers are only sufficiently flexible for a limited time period determined by the recited formulation. It is also clear from the specification that after processing the resultant wafers have their characteristic and desirable crispness after further cooling (*See, e.g.*, Specification at page 3, lines 19-23).

Thus, the rejection under 35 U.S.C. § 112, first paragraph, is believed to be moot for these reasons.

Claims 1-8 were rejected under 35 U.S.C. § 112, first paragraph, for the claim language uncooked in reference to cereal grits. As suggested in the previous Amendment, Applicants have removed the term "uncooked" since it does not explicitly appear in the application in connection with the claimed sugar wafer batter and since the "uncooked" term is somewhat duplicative or redundant in view of the claimed batter. Initially, Applicants note that when no temperature or pressure is stated in a disclosure, it is assumed to be ambient temperature and pressure. Similarly, when a batter is discussed, it is expected that all the components are raw, uncooked components, similar to ambient conditions. Only if a component in an uncooked batter were cooked would this state specifically be called out for attention. Even though the term "uncooked" has been removed, the claims still recite the uncooked state of the cereal grits by virtue of claim 1 reciting a batter (*See* Conti Declaration at ¶¶ 5 and 8); nothing in the application suggests otherwise. Also, it is clearly understood by those of ordinary skill in the art that, when referring to components of a composition *to be baked*, they are uncooked unless explicitly disclosed to be otherwise. Indeed, claim 1 clearly recites a sugar wafer batter, and it is clearly understood that components in a batter are uncooked unless something to the contrary is noted (*See* Conti Declaration at ¶¶ 5 and 8). Components in a "batter" are inherently understood to be combined to form the batter before being cooked. Nowhere does the application refer to the wheat flour, grain component, reducing sugar, or sugar additive of the sugar wafer batter composition as being cooked before they are combined in the sugar wafer batter and then the batter is baked. No rejection has been imposed--or could properly be imposed--with respect to those ingredients, because it is clearly understood that they are also uncooked when in the "batter." Thus, Applicants respectfully believe that the rejection under 35 U.S.C. § 112, first paragraph, be reconsidered and withdrawn.

Claims 1-20 were rejected under 35 U.S.C. § 103(a) as being obvious over U.S. Patent No. 5,709,898 to Biggs et al. ("Biggs") in view of *The Wholefood Catalog*, Ballantine Books (1988), p. 12 ("The Wholefood Catalog"); *Cookies & Crackers*, Time-Life Books, Inc. (1982), pp. 34-35 ("Cookies & Crackers"); and U.S. Patent No. 4,629,628 to Negro ("Negro") for the reasons recited on pages 2-4 of the Office Action. Applicants respectfully traverse.

Biggs teaches a pre-formed food core around which a sugar wafer including flour and invert sugar is formed by heating a portion of the wafer. Biggs fails to teach the

following features presently recited: (a) wheat flour, alone or in combination with cereal grits; (b) water; and (c) sufficient flexibility under ambient conditions for more than 40 seconds to about 100 seconds after baking, each of which is presently recited. While Biggs teaches flour generically, there is absolutely no recognition that a particular type of flour combined with either grits or reducing sugar, as presently recited, can provide the surprising and unexpected increase in wafer flexibility obtained by the claimed invention, much less what type of flour that might be (*See* Conti Declaration at ¶¶ 6-7). Biggs also specifically teaches wafer components (pre-baking) in Example 1 that has *zero* water content and has no other teaching with respect to water content. The Office Action states at page 3 that it would have been obvious to add water to create a wafer batter, however, Biggs teaches otherwise. In fact, Biggs specifically states that the composition of Example 1 *was shaped* into a circular wafer. There is not even the remotest suggestion that additional ingredients such as water were required, and nothing in Biggs teaches that a wet batter is required. Also, Biggs teaches only a limited amount of invert sugar, which is not sufficient to obtain the claimed flexibility as further discussed herein (*See, e.g.*, claims 11 and 13, which explicitly recite distinct amounts of reducing sugar component compared to Biggs). The Office Action states, *e.g.*, that more sugar is obvious since it makes the wafer sweeter, however, this would obviously teach away from the claimed invention by making the ratio of sugar to reducing sugar component more distinct from that functionally or explicitly recited. In the other embodiment, claims 1 and 9 each recites grits, which Biggs completely fails to teach.

More importantly, Biggs does not teach sufficient flexibility under ambient conditions after baking, as presently recited, since Biggs clearly requires localized heating of the wafer to well above ambient conditions (*See* Conti Declaration at ¶ 7). Instead, this localized heating is Biggs' solution to the problem of wafer processing. Biggs contacts a particular portion of a wafer with a hot plate (Biggs Example 1) to attain sufficient flexibility to permit shaping around its pre-formed food core. The Office Action does acknowledge various deficiencies in Biggs' completely different teachings, including failure to teach grits, the ratio of wheat flour to grits, the amount of water (which is not taught by Biggs at all), the amount of "ingredients" claimed, *the flexibility at ambient temperature* (Office Action, pages 2-3), the water activity of the second confectionery material, and that the flour is wheat flour. Importantly, the Office Action even states on the record that the surprising and unexpected benefit of the claimed invention--sufficient flexibility under ambient conditions after baking--is not taught *at all* by the primary reference. It must also be added that none of the secondary references teach this feature either, and they also fail to remedy other deficiencies of Biggs.

The Office Action then states on page 4 that the claims are not unexpected and that wafers are expected to be flexible after baking, even after 40 seconds. Applicants agree that wafers are expected to be flexible after baking, however, only for very short times of less than 40 seconds. The increase in flexibility over longer periods of time after baking is a surprising and unexpected result of the claimed invention, notwithstanding the bald, completely unsupported assertion of the Patent Office. Rather, as clearly stated in the application and the Conti Declaration at ¶¶ 6 and 13, the claimed sufficient flexibility is a surprising and unexpected advantage of the present invention. The clams recite different components not taught by the cited references and even then the combination fails to teach these surprising results as further discussed herein (Conti Declaration at ¶ 12-13).

The Wholefood Catalog fails to remedy any of these deficiencies present in Biggs. The Office Action relies on Wholefood Catalog solely for the teaching that one can add a small amount of cooked grits to batters for muffins, griddle cakes, or quick breads, *i.e.*, all dough based products, for extra moisture and flavor. Initially, it should be mentioned that even the combination of Biggs and The Wholefood Catalog fails to disclose or suggest (a) wheat flour and (c) sufficient flexibility, as well as the ratio of wheat flour to grits, as well as the amount of water and other ingredients presently recited. Also, the Wholefood Catalog teaches the use of *cooked* grits, while claim 1 of the present invention recites a batter which inherently includes uncooked cereal grits in an amount sufficient to be baked (*See* Conti Declaration at ¶ 8). Thus, the Wholefood Catalog fails to teach the use of uncooked grits, *i.e.*, grits in a batter, to obtain the surprising and unexpected benefits of a sugar wafer batter and product that can be processed for a longer period of time, thereby reducing energy consumption and the need for more expensive high speed processing equipment.

Moreover, The Wholefood Catalog does not even teach a sugar wafer batter, as recited by claim 1, since Wholefood Catalog discloses dough-based products, which are different from sugar wafer batters (Specification at page 1, lines 23-27; Conti Declaration at ¶¶ 8 and 11). In view of this, one of ordinary skill in the art would not have been motivated to combine ingredients used in a dough-based product with those of a batter material or product (*Id.*). For these reasons, a *prima facie* case of obviousness cannot have been stated, and the obviousness rejection should be withdrawn for these reasons.

The Office Action correctly states that Cookies & Crackers teaches wafers flexible enough while still warm from the oven that can be bent into curved shapes. Examining Cookies & Crackers more carefully, as one of ordinary skill in the art would, it becomes clear that Cookies & Crackers is simply cumulative to Biggs (*See* Conti Declaration

at ¶ 9). In particular, Cookies & Crackers teaches that wafers stiffen quickly and that the processing window where the baked wafers are flexible is extremely short. Instead, Cookies & Crackers teaches to heat only a few wafers at a time so they can be quickly handled before flexibility is lost, or that wafers can be reheated in the oven to increase pliability for further processing (*Id.*). Also, the present invention recites the surprising and unexpected benefit of sufficient flexibility under ambient conditions, *i.e.*, no further heating is required, while Cookies & Crackers teaches away by disclosing that further heating is required (*Id.*). Cookies & Crackers does not teach any additional features when added to Biggs other than the suggestion to heat only a few at a time, which actually *teaches away* from the presently claimed batter that permits an increased processing window through sufficient flexibility at ambient conditions after baking.

Negro is relied upon to teach wheat flour and water in sugar wafer formulations. Negro fails to remedy various deficiencies of the other cited art, as it does not teach cereal grits or a reducing sugar combined with sucrose, as presently recited (*See* Conti Declaration at ¶ 10). Negro *teaches away* from Biggs by disclosing multi-layer crisp, unbreakable wafer sheets, *i.e.*, formulations that are not designed to be flexible after baking (*Id.*). Negro does not teach that wafers are flexible at all, and does not attempt to manipulate its resultant wafer sheets (*Id.*).

Moreover, no motivation existed for one of ordinary skill in the art to combine the cited references. Biggs and Cookies & Crackers are directed to sugar wafers and heating to increase flexibility after baking, while The Wholefood Catalog is directed to dough products including cooked grits (Conti Declaration at ¶ 11). Negro is directed to yet a different type of sugar wafer--multi-layer sheets that require high crispness and space for providing a filling between the layers. Biggs attempted to solve the known processing problem in a completely different manner from the present invention and Negro by providing localized heating after baking to shape the wafer. Negro, on the other hand, provides only crisp multi-layer sheets of wafer that are not taught to have any flexibility. Thus, Negro teaches away from Biggs by providing a perfectly acceptable crisp product that does not require flexibility, and in fact teaches wafer formulations including water and wheat flour that result in a crisp, limited-flexibility wafer (*See* Conti Declaration at ¶ 11). On the contrary, the present invention provides and claims a specific and unique wafer composition to provide the unexpected and surprising result of a wafer that does not require heating to provide this sufficient flexibility. Indeed, Biggs teaches those of ordinary skill in the art away from the

presently claimed invention by requiring such localized heating to permit sufficient flexibility under ambient conditions after cooking (*See* Conti Declaration at ¶ 11).

Another reason no motivation existed to combine the cited references is that the dough products of The Wholefood Catalog are significantly different from sugar wafers, in part since they have much higher water contents than sugar wafers--especially Biggs, which has no water content in its sugar wafers. Also, such dough products differ from sugar wafers in having different textures and being far more flexible than crispy like the sugar wafers of the invention. Dough products and sugar wafers are completely different food products with completely different processability characteristics (*See* Conti Declaration at ¶ 11). The Wholefood Catalog teaching relied on by the Office Action merely discloses using cooked grits with muffins, griddle cakes, and breads, and thus would not have motivated one of ordinary skill in the art to solve the long-felt need in the art to improve crisp sugar wafer processing problems (*Id.*). Further, the Wholefood Catalog only teaches the combination of cooked grits with those dough products for the purpose of extra moisture and flavor, and none of the cited references provides motivation to combine grits with even dough-products--much less sugar wafers--for the purpose of increased flexibility after baking. As a result, nothing in the cited references provides a motivation to combine uncooked grits with other components to form a sugar wafer batter or any other kind of batter, as presently recited (*Id.*).

Moreover, Biggs and Cookies & Crackers taught a different solution to the flexibility problem in the wafer art, such that no motivated existed based on these references to provide a different sugar wafer batter to provide increased flexibility. In fact, Biggs and Cookies & Crackers motivate an artisan to look no further--they already teach to simply reheat the wafer to provide additional processing flexibility. In sum, nothing in the record or the cited art provided a motivation to combine the cited art.

Additionally, even assuming a motivation to combine these references, or the different products disclosed therein, could be generated based on hindsight, no reasonable expectation of success in achieving the present invention existed since the cited references in combination still do not teach all the features presently recited (*See* Conti Declaration at ¶ 12). For example, none of the references teaches sufficient flexibility under ambient conditions for more than 40 seconds to at least 70 seconds after baking to enable further wafer processing. Also, all cited references completely fail to teach uncooked grits in a sugar wafer batter or sugar wafer product. Further, the dough product of The Wholefood Catalog when combined with the disparate components of the sugar wafers of the other references would not have provided one of ordinary skill in the art with a reasonable expectation of

success in picking and choosing components and amounts thereof from these different products to arrive at the desired and claimed characteristics. Moreover, while flour was taught by Biggs, inherently taught by The Wholefood Catalogue and Cookies & Crackers, and specifically wheat flour was taught by Negro, even the combination does not remotely suggest that wheat flour in particular when coupled with reducing sugar and/or grits could provide surprising and unexpected advantages presently obtained in wafers when combined with the claimed reducing sugar and/or grits. For these additional reasons, no *prima facie* case of obviousness has been stated (*See* Conti Declaration at ¶¶ 11-13).

It is completely improper to rely on The Wholefood Catalog simply because it has a component "missing" from the other cited references--cooked grits in a dough product. Even if it were proper, The Wholefood Catalog still fails to teach the different component presently claimed, *i.e.*, uncooked grits in a sugar wafer batter. Under these circumstances, such a hindsight rejection must fail--in particular because nothing in any of the cited references provides motivation to combine features of a dough product with a sugar wafer. The Office Action maintains a rejection based on multiple references to combine disparate components used for completely unrelated purposes without any teaching or motivation in the references to do so. In the obviousness context, a motivation must have existed for one of ordinary skill in the art to combine the references--and the lack of such a motivation demonstrates the patentability of the claims over the cited references, or at the very least demonstrates the lack of a *prima facie* case of obviousness by the Patent Office. *In re Lee*, 277 F.3d 1338, 61 U.S.P.Q.2d 1430 (Fed. Cir., 2002) (finding that the Board of Patent Appeals and Interferences improperly relied upon common knowledge and common sense of person of ordinary skill in art to find invention of patent application obvious over combination of two prior art references, since factual question of motivation to select and combine references could not be resolved on subjective belief and unknown authority).

Furthermore, independent claims 9 and 13 have not been properly addressed by the Patent Office. Biggs fails to teach the cereal grits and water of claim 9, in addition to lacking the sufficient flexibility recited in claim 9 (Conti Declaration at ¶ 7). Biggs also fails to teach that sucrose is present in an amount of from 50 to 100 parts by weight per 100 parts by weight of the wheat flour and cereal grits. Even if the flour were improperly assumed to be wheat flour, the sucrose and invert sugar of Biggs do not equal even 40 parts by weight, which is far below the amount required by claim 9. Even if a motivation to combine Biggs and The Wholefood Catalog existed, which it does not (Conti Declaration at ¶ 11), The Wholefood Catalog does not provide any guidance as to suitable amounts of its cooked grits

compared to the other ingredients of its dough based products, as recited in claim 9. Biggs also fails to disclose water in the sugar wafer, much less an amount from about 0.5% to 6% by weight based on the weight of the sugar wafer, as required by claim 13. Also, Biggs fails to teach the sucrose and reducing sugar are present in an amount of from 50 to 100 parts by weight per 100 parts by weight of the flour, and, importantly, that the ratio of sucrose to reducing sugar is from 80:20 to 20:80, as recited in claim 13. At best, the improper combination of the other cited references only provides cooked grits and wheat flour, but even this improper combination still fails to teach the recited features of claims 9 and 13 for these additional reasons.

Various additional claims recite patentably distinct features, even in view of the combined teachings of the cited references. Claim 7 recites that sufficient flexibility is retained in the recited sugar wafer for more than 50 seconds to 100 seconds, which is also clearly not taught by the cited art as previously discussed. Claim 11 recites that 20 to 80 weight percent of the sucrose is replaced with a reducing sugar component, while Biggs at best teaches 24.2% sucrose and 4.5% invert sugar, a reducing sugar component, such that only 4.5 / (24.2+4.5) = 15.7% of the sucrose is replaced by invert sugar. The cited references, even improperly combined as a whole, still fail to teach this feature recited in claims 11 and 13. The cited references failed to provide a motivation to "optimize" Biggs' amount of invert sugar higher, since Biggs itself provides no teaching that sugar wafer flexibility can be increased through any means other than localized heating after baking (Conti Declaration at ¶ 7), and even the combination of references does not provide any teaching for surprisingly and unexpectedly increasing sugar wafer flexibility as presently recited (*See* Conti Declaration at ¶ 12-13). Claims 15-17 recite a confectionery material having a water activity below 0.5 and in direct contact with the sugar wafer, which surprisingly and unexpectedly minimizes or avoids problems of water migration into the sugar wafer (*See, e.g.*, Specification at page 5, lines 23-26). The current Office Action even concedes that Biggs fails to disclose these features, and nothing in the Office Action points to any teaching in *any* of the references as to the water activity of the claimed confectionery material. In fact, Biggs fails to even suggest such a feature, as acknowledged by the Patent Office. Instead, Biggs discloses use of a moisture barrier between any food core and the wafer to avoid the water migration problem, which *teaches away* from using low water activity confectionery materials in direct contact with the wafer, as presently recited. Thus, these dependent claims are separately patentable for these additional reasons. For these

reasons, and as supported by the Conti Declaration at ¶¶ 6-13, Applicants respectfully request that the rejection of claims 1-20 under 35 U.S.C.
§ 103(a) be reconsidered and withdrawn, since a *prima facie* case of obviousness has not been stated on the record.

Even if a *prima facie* case of obviousness had been stated, Applicants have submitted probative evidence on the record that is sufficient to rebut even such a *prima facie* case. In particular, the application itself shows a demonstration that sugar wafer batters, and the resultant wafers, prepared according to the invention provided surprising and unexpected results in increasing sufficient flexibility for further processing (Conti Declaration at ¶¶ 6 and 13). Example 1 illustrates that sugar wafers of increased crispiness (*i.e.*, hardness and crunchiness) were obtained that remained flexible for over 100 seconds (*Id.*). Thus, probative data exists on the record that, when considered with all the deficiencies of the cited references and the lack of motivation to combine the same, is sufficient to rebut even a *prima facie* case of obviousness.

Applicants now believe all claims to be in condition for allowance. Should the Examiner not agree with this position, a telephone or personal interview is requested to resolve any remaining issues.

Respectfully submitted,

3/25/03
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